P G U

The Law Offices Of

Previant,
Goldberg,
Uelmen,
Gratz,
Miller &
Brueggeman, S.C.

Writer's Direct Number ~ 414-223-0437

January 6, 2011

Via UPS Next Day
Mr. Lester Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Re: Roundy's Inc. vs. Milwaukee Building and Construction Trades Council, AFL-CIO
Case No.: 30-CA-17185-A

Dear Mr Heltzer:

Enclosed please find the original Brief of the Charging Party along with eight copies as well as a Certificate of Service.

If you have any questions, please do not hesitate to contact me

Very truly yours,

PREVIANT, GOLDBERG, UELMEN,
GRATZ, MILLER & BRUEGGEMAN, S.C.

BY Yingtao Ho

YINGTAO HO
yh@previant.com

YH/cyp

s \docs\bui006\70176\m0432510 docx

1555 North
RiverCenter Drive,
Suite 202
PO Box 12993
Milwaukee, WI 53212
Fax 414 271 6308

Telephone 414 271 4500
Toll Free 800 841 5232

OPEIU
UNION LABEL

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of:

ROUNDY'S INC.,

Respondent,

and **Case 30-CA-17185-1**

MILWAUKEE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO,

Charging Party.

BRIEF OF THE CHARGING PARTY

Submitted by:

Matthew R. Robbins
Yingtao Ho
Previant, Goldberg, Uelmen,
Gratz, Miller & Brueggeman, S.C.
1555 N. RiverCenter Drive #202
Milwaukee, WI 53212
PH: 414/271-4500
FAX: 414/271-6308

ATTORNEYS FOR MILWAUKEE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO

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I. Introduction.

In a decision issued on November 12, 2010, the NLRB affirmed the ALJ's decision that Roundy's lacked a sufficient property interest to exclude the members of the Council from engaging in area standards handbilling on the property of 23 of the 25 stores covered by the General Counsel's complaint. The Board has invited additional briefing on how the complaint's allegations concerning the two remaining stores, where Roundy's under Wisconsin law has some exclusionary property interest, should be resolved.

The Board has long held that the selective or inconsistent enforcement of an otherwise valid no-solicitation policy violates §8(a)(1) of the Act. While Roundy's has promulgated a no-solicitation policy that prohibits all non-employee solicitations on its property with the exception of isolated charitable solicitations, it has in fact (and contrary to its policy) permitted a wide range of civic, political, and charitable solicitations on its property, with the sole exception of handbilling by the Council. Roundy's discriminatory enforcement of its no-solicitation policy violated §8(a)(1) of the Act, regardless of whether the policy is facially valid. The remaining counts of the complaint therefore can be resolved without reconsidering the Board's policy as set out in *Sandusky Mall Co.*, 329 NLRB 618, 623 (1999).

To the extent the Board does use the case at bar as an opportunity to review the access rights of nonemployees, an employer by permitting a wide range of charitable solicitations at the same time that it prohibits union solicitations has indicated that it has no objection to the union's presence on its property. It is exercising its management interest in regulating the conduct of persons permitted on its property, rather than its

property interest to exclude persons from its property. The employer's discrimination in the exercise of its management interest must be justified by the balancing test laid out in *Republic Aviation*, 324 U.S. 793 (1945). The Board should define the term "discrimination" as used in *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 113 (1956) to mean each instance in which the employer does not have an objection to the presence of nonemployees on its property for non-business related purposes, but is rather exercising its managerial interest to single out, and interfere with union solicitation. Once a showing of discrimination has been made, the employer must advance a justification for its interference with union solicitation that both outweighs the union's §7 rights, and does not discriminate against activities protected by §7. Since Roundy's has permitted a wide range of charitable, civic and political solicitations on its property, it must advance a sufficient and non-discriminatory business reason to justify its interference with Council handbilling.

Additionally, the Council respectfully urges the Board to review the approach by *Sandusky Mall* to analyze the right of employees to access employer property to engage in area standards activities through their §7 representative as the access right of nonemployees. The Board should overrule *Leslie Homes*, 316 NLRB 123 (1995), and hold that area standards activity conducted by a labor organization on behalf of employees who have already exercised their §7 right to select the union as their representatives for collective bargaining and contract enforcement is conducted by employees rather than non-employees. Under the Supreme Court's *Republic Aviation* decision, 324 U.S. 793 (1945), an employer violates §8(a)(1) by interfering with the employees' core §7 activities, unless it has a business justification that outweighs the

employees' §7 rights. The Board should apply the *Republic Aviation* balancing test to protected area standards activities by employees.

Roundy's waived its right to object to Council handbilling by permitting a wide range of non-charitable and potentially controversial solicitations on its property. Roundy's has therefore discriminated against Council handbilling because of its nature as §7 activity, i.e. because it disagreed with the message of the Council's handbilling campaign, in violation of §8(a)(1).

II. Analysis.

1. The Facts of the Case Which Show Roundy's Discriminatorily Applied its No-Solicitation Policy.

The evidence established that Roundy's maintained an official policy on non-employee solicitations, which it never enforced against anyone before the Council commenced its area standards activities. The official policy stated:

> Solicitation of any kind, as well as the distribution of any literature of any kind, by all non-employees on company property is prohibited (Note: Exceptions to this rule may be made upon special request for charitable organizations involving limited situations.

In practice, the parties stipulated that:

> Respondent (i.e. Roundy's) regularly allows various other civic, political and/or charitable solicitations at various times inside and outside several of its stores.

Jt. Ex. 1. In other words, in addition to the limited charitable solicitations permitted by its no-solicitation policy, Roundy's has knowingly permitted a wide range of political and civic solicitations on its property, in violation of its own no-solicitation policy. The record shows Roundy's has permitted political candidates and environmental groups such as WISPRIG to solicit for the support of its customers on Roundy's property. (Tr. 117, 127, 130) Roundy's additionally permitted UFCW Local 1444, another labor organization, to

handbill an anti-Walmart message on its property, at the same time that it prohibited the Council to handbill its area standards message on its property. (Tr. 134) In contrast to the employer in *Sandusky Mall*, 329 NLRB 618, 619 (1999), enf. Denied 242 F. 3d 682 (6th Cir. 2001), which prohibited a wide range of what it deemed to be commercial and potentially controversial solicitations on its property; Roundy's has never enforced its no solicitation policy against anyone except the Council.

An employer with a facially valid no-solicitation policy cannot discriminatorily apply the policy to some, but not other solicitations prohibited by the policy on its face. *Lincoln Center for the Performing Arts*, 340 NLRB 1100 (2001) (Employer cannot suddenly begin strict enforcement of a no-solicitation policy for the purpose of interfering with union solicitations); *The Lawson Co.*, 267 NLRB 463, 471 (1983) (Employer violated the Act by strictly enforcing its no-solicitation policy against union solicitation at the same time that it took a softer attitude against other, non-union related solicitations that also violated its policy). Courts of appeals have consistently enforced the Board's decisions against the selective enforcement of no-solicitation policies: *NLRB v. Preu-Elec. Inc.*, 309 F. 3d 843, 851 (5th Cir. 2002); *ITT Indus. V. NLRB*, 251 F. 3d 995, 1006 (D.C. Cir. 2001); *Four B corp. v. NLRB*, 163 F. 3d 1777 (10th Cir. 1998). The rule against discriminatory application of a no-solicitation policy is consistent with the Board's broader rule that an employer may not apply a facially neutral policy to discriminate against union activities. *See for example Solvay Iron Works*, 341 NLRB 208, 213 (2004) (Employer cannot changing its hiring processes for the purpose of justifying its refusal to hire salts); *Lin R. Rogers Electrical Contractors*, 328 NLRB 1165, 1166-1167 (1999) (employer cannot justify refusal to hire on the ground that it normally

fills staffing needs through transfers, when its hiring-through-transfer policy was inconsistently enforced).

Roundy's has enforced its no-solicitation policy against the Council's solicitation of customer support for its area standards message, at the same time it has declined to enforce its no-solicitation policy against the UFCW's solicitation of customer support for its anti-Walmart message, WISPRIG's solicitation of customer support for its environmentalist message, and political candidates' appeal for political support from Roundy's customers. Under the definition of discrimination promulgated by the Board in *Guard Publishing Co.*, 351 NLRB 1110 (2007), Roundy's has discriminated amongst appeals for customer support by outside groups on §7 lines: It has permitted appeals for customer support that are outside the protection of §7, at the same time that it prohibited the right of employees and their union, protected by §7, to appeal for support for its area standards message among the same customers. *See also Guardian Industries Inc. v. NLRB*, 49 F. 3d 317, 321 (7th Cir. 1995) (Practice of tolerating all but union notices (i.e. solicitations) is anti-union discrimination by anyone's definition). Roundy's has committed discrimination in violation of §8(a)(1) by singling out the Council's area standards activities, and discriminatorily enforcing its no-solicitation policy along §7 lines.

In *Sandusky Mall*, the Board considered whether an employer may enforce a consistently applied no-solicitation policy that prohibited union solicitation at the same time that it permitted a wide range of charitable solicitations. *See* 329 NLRB at 621-623. Regardless of the validity of the definition of discrimination announced in *Sandusky*, it remains black letter Board law that an employer may not enforce a facially

valid no-solicitation policy to discriminate along §7 lines to prohibit union solicitations, at the same time that it permits other solicitations that are also on the face of the policy prohibited.

2 Even if Area Standards Activities are by Non-employees, Republic Aviation is Applicable to Determine Whether the Employer May Interfere with Union Solicitation, Once the Employer has Permitted a Wide Range of Charitable Solicitations on Its Property.

In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945), the Court affirmed the Board's position that an employer may not restrict the rights of employees to discuss self-organization on the employer's property, unless the employer can demonstrate that the restriction is necessary to maintain production or discipline. In *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1953), the Court held that *Republic Aviation* ordinarily would not apply to nonemployee organizers because:

> It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit.

Babcock, 351 U.S. 105, 113. By "these cases", the Court was referring to cases such as *Republic Aviation* that balanced the employees' §7 rights with the employer's property rights. *Babcock*, 351 U.S. at 110-112. The Court therefore held that the *Republic Aviation* balancing test did not apply to nonemployee organizers when the employees are accessible, and the employer did not discriminate against union solicitation. Since the Board and court law prior to *Babcock* held that the balancing test was applicable to each case of nonemployee access, *see Babcock*, 351 U.S. at 111-112, following *Babcock* the balancing test remained applicable when the employees are

inaccessible, or when discrimination did occur.

The Board has adopted the above interpretation of *Babcock* in cases where the employees are inaccessible to union organizers. A finding of inaccessibility does not require the employer to open its property to nonunion organizers, but rather requires the Board to determine whether nonunion organizers have a right of reasonable access, depending on whether the benefit to employees of permitting nonemployee access outweighs the prejudice that the access would pose to employer interest. *S & H Grossinger's Inc.*, 156 NLRB 233, 262-263 (1965). In enforcing the Board's decision, the Second Circuit similarly held that the employer could not justify prohibiting nonemployee organizers from accessing its property, when it cannot show the access would cause it to suffer detriment. *NLRB v. S & H Grossinger's Inc.*, 372 F. 2d 26, 30 (2nd Cir. 1967). Since *Babcock* drew a parallel between cases in which employees are inaccessible to nonemployee organizers and cases in which the employer discriminated against nonemployee organizers, the same balancing test should apply once the Board determines that an employer did discriminate against nonemployee organizers in permitting access to its property. Indeed, at least one pre-*Babcock* Supreme Court decision seemed to apply the same balancing test to the discrimination arena. *See NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 230 (1949) (When an employer discriminated between permitting the union and other third parties to use its meeting hall, the discrimination violated the Act because it was for the purpose of interfering with the union's §7 protected activities).

In *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Court interpreted *Republic Aviation* to hold that:

> A whole different balance is struck when the organizational activity was carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property interests were there involved. The difference is one of substance.

Hudgens, 424 U.S. at 522 n. 10 (Internal citations omitted). This balancing test outlined in *Republic Aviation* is applicable when the employer is exercising its management interest to regulate the activities of persons who are legitimately on its property, rather than its property interest to exclude persons from its property. *Hudgens* is consistent with the long term view of the Board that when an employer has already permitted a wide range of non-union and non-business related access on its property, an order requiring the employer to permit access for §7 activities does not infringe upon the employer's property rights. *Gallup American Coal Co.*, 32 NLRB 823, 829 (1941) (No interference with employer property interest by ordering employer to permit union to paint signs on boulders on its property, when employer already permitted other parties to pain signs on boulders on its property that are not related to its business).

The Board should interpret the discrimination exception in *Babcock* in a manner congruent with *Hudgens*' interpretation of *Republic Aviation*: The discrimination exception is applicable when the employer has permitted sufficient non-union related solicitations onto its property, so that its regulation of the union solicitation constituted the exercise of its management interest, rather than its property interest.

Board law is clear that once an employee is permitted on employer property, *Republic Aviation* applies to the employer's regulation of non-work related solicitations by the employee on its property, regardless of who is the employee's ultimate employer. *Guard Publishing Co.*, 351 NLRB 1110, 1115-1116 (2007) (Once an employee is properly on employer property, the employer's regulation of the employee's right to

engage in face to face solicitations with other employees exercises its management interest, rather than its property interest); *Southern Servs.*, 300 NLRB 1154, 1155 (1990), *enforced by* 954 F. 2d 700 (11th Cir. 1992) (*Republic Aviation* applies to the employee of a contractor who regularly works on the employer's property so that he is authorized to be present on the employer's property, and is neither a trespasser nor a stranger).[1] There is no policy or reason why the same protection should not apply when an employer permits a nonemployee onto its property, but then regulates the type of non-business related solicitations that the employee is permitted to engage in on its property.

Once an employer permits a wide range of charitable non-business related solicitations on its property, it makes clear that persons may be present on its property and solicit its customers, even though neither the person's presence on the property nor the actual solicitation is related to its business. The employer presumably would have no objection, if a union member or employee conducted similar charitable solicitations on its property. In such a case, the employer is exercising its managerial authority to control the type of non-business related solicitations that non-employees may engage in on its property, rather than exercising its property interest to exclude non-employees from its property. Balancing the nonemployees' §7 rights with the employer's rights is unnecessary only when the employer does not permit any outside solicitations on its property, i.e. when the employer's interference with nonemployee access was an

[1] While the D.C. Circuit did distinguish *Southern Services* in *New York New York Casino*, 313 F. 3d 585 (D.C. Cir. 2002), that case is distinguishable on the facts. In that case, the employees were employed by restaurants who operated on a portion of the casino's property. The employees engaged in solicitations outside the property occupied by the restaurants, i.e. on property that they ordinarily would not have the right to stay at as restaurant employees.

exercise of its property right rather than its management right. *Oakwood Hospital v. NLRB*, 983 F. 2d 698, 703 (6th Cir. 1993); *Baptist Medical Systems, v. NLRB*, 876 F. 2d 661, 664 (8th Cir. 1989) (Both holding that employer may prohibit union solicitations in cafeterias open to the public without engaging in balancing only because there is no showing it permitted nonemployees other than union organizers to solicit in the cafeteria). *See also Lucille Salter Children's Hospital v. NLRB*, 97 F. 3d 583, 590-591 (D.C. Cir. 1996) (It would eviscerate §8(a)(1)'s prohibition against union discrimination if an employer can prohibit union solicitations, at the same time that it labels all non-union related solicitations as beneficial to its employees and therefore permitted).

Decisions by courts of appeals adopting a narrower definition of discrimination are not persuasive because they are based on the incorrect view that a finding of discrimination under *Babcock* would per se require the employer to permit unlimited union solicitations on employer property. For example, in *Cleveland Real Estate Dealers v. NLRB*, 95 F. 3d 457, 465 (6th Cir. 1996), the court reasoned that in light of *Lechmere* and *Babcock*'s protection of property rights:

> To discriminate in the enforcement of a no solicitation policy cannot mean that an employer commits an unfair labor practice if it allows the girl scouts to sell cookies, but is shielded from the effect of the Act if it prohibits them from doing so.

The Sixth Circuit thus assumed that a finding of discrimination under *Babcock* would mean that any discrimination between union and charitable solicitations was a per se §8(a)(1) violation. *See also Be-Lo Stores v. NLRB*, 126 F. 3d 268, 284 (4th Cir. 1998) (Finding of discrimination would mean that an employer can never distinguish between charitable and union solicitations). The need to narrowly define discrimination to protect private property rights becomes far less compelling, when the result of a discrimination

finding under *Babcock* is that the employer must show an adequate justification for its disparate treatment of union solicitations; rather than a per se conclusion that the employer can never discriminate between charitable and union solicitations.[2]

The Board should hold that an employer has discriminated against union solicitation within the meaning of *Babcock* by permitting a wide range of non-employee non-business related solicitations at the same time that it prohibits the union solicitation. Once discrimination occurs, the employer can justify its exercise of its management interest to limit union solicitations only by showing that its management interest outweighs the employees' § 7 right to engage in the union solicitation. Since Roundy's has permitted a wide range of charitable, civic, and political solicitations on its property, it clearly is objecting to the type of non-business activities the Council is engaging in on its property, rather than the fact that the Council is engaging in non-business related activities on its property. Roundy's is therefore exercising its management, rather than property interest when it interfered with Council handbilling. Roundy's therefore must justify its interference with Council handbilling under the *Republic Aviation* balancing test, regardless of whether the Council's handbilling involved the exercise of §7 rights by employees or non-employees.

3. An Employer may Interfere with Union Solicitations on Its Property Only if Its Property Interest Outweighs the Employees §7 Rights, Since Area Standards Activities are by Employees Through Their Chosen Representatives.

a. Area Standards Activities Constitute the Exercise of Direct §7

[2] The only other circuit to adopt a narrow definition of "discrimination" as that term is used in *Babcock* is the Second Circuit. In *Salmon Run Shopping Center v. NLRB*, 534 F. 3d 108, 116 (2nd Cir. 2009), the court held that discrimination within the meaning of *Babcock* should be narrowly defined because the employer may exercise its property right to control what are allowed on its property. *Salmon Run* thus disregards the teachings of *Hudgens* and *Babcock* that once an employer permits a nonemployee onto its property, it has a management interest over what activities are conducted on its property, rather than a property interest to exclude the person from its property.

Rights by Employees, rather than the Derivative Exercise of §7 rights by Nonemployees.

§7 of the Act, 29 U.S.C. §157, protects the rights of employees to engage in concerted activities for the purpose of mutual aid and protection. The term employee, in turn, is broadly defined to:

> Include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise....

29 U.S.C. §152(3). Since §7 of the Act does not limit its reach to employees of a particular employer, it protects the rights of employees to engage in concerted activities for the purpose of mutual aid and protection, even when those activities do not directly involve their employer. *Eastex Corp. v. NLRB*, 437 U.S. 556, 565 (1978). The Court there further recognized that concerted activities for mutual aid and protection represent a broader category than concerted activities for self-organization and collective bargaining. Concerted activities for mutual aid and protection include employees' attempts to improve their working conditions through resort to administrative and judicial forums, their appeals to legislators to protect their interests as employees. Closer to the facts of the case at bar, concerted activities also include employee appeals to improve the minimum wage for other employees when the minimum wage inevitably influences wage levels derived from collective bargaining, and may gain reciprocal support for the employees when they have a future dispute with their employer. *Id.* at 565-569.

In *Giant Food Markets*, 241 NLRB 727, 728 (1979), *enforcement denied on other grounds by* 633 F. 2d 18, 26 (6th Cir. 1980), the Board recognizes that when employees engage in area standards activities, they are engaging in activities for their own mutual aid and protection protected by §7 of the Act:

> Area standards picketing is engaged in by a union to protect the employment standards it has successfully negotiated in a particular geographic area from the unfair competitive advantage that would be enjoyed by an employer whose labor cost package was less than those of employers subjected to the area contract standards. Failure to protect these standards could result in an undermining of wages and benefit gains in such areas. Therefore, in its attempt to protect the area standards, the union acts not only in its own interest, but also in the interest of employees of employers with whom it has negotiated more beneficial employment standards. It is this legitimate nature of the union's actions which we believe makes properly conducted area standards picketing not only lawful, but affirmatively protected under Section 7 of the Act. Employees have a right to protect advancements they have made, and their union as their representative has a right to protect their interests.

Employees receiving area standards wages and benefits therefore have a legitimate interest, protected by §7, to engage in concerted activities for the purpose of ensuring fair competition, so that work is available to employers who pay area standard wages and benefits.

In *O'Neil Markets v. UFCW Local 88*, 95 F. 3d 733, 737 (8th Cir. 1996), a decision that was issued three years after *Lechmere* was decided, the Eighth Circuit agreed with the Board's analysis that area standards activities implicate the direct §7 right of employees to protect area standards wages and benefits for their own mutual aid and protection. The Eighth Circuit reasoned that area standards activities do not fit neatly within the *Lechmere* construct both because they are appeals to consumers rather than to employees, and because:

> Employees who may engage in concerted activities under section 7 include any employee, and shall not be limited to the employees of a particular employer. In this case, the parties agree that the handbillers were not only union members but also employees (though not employees of O'Neil's). As such, they were exercising their own rights under section 7 to engage in concerted activities for their mutual aid or protection.

Area standards activities therefore implicate the direct §7 right of employees to protect their negotiated area standards wages and benefits. The employees' §7 rights do not

weaken in strength when they are exercised through the employees' collective bargaining representative, rather than by the employees themselves. *Golden Stevedoring Co.*, 335 NLRB 410, 415 (2001); *Sears, Roebuck & Co.*, 304 NLRB 58, 59 (1991) (Picketing in support of a strike using non-employees is exercising a core §7 right of the employees who are engaging in the strike). Area standards activities, conducted by the union on behalf of employees who have already exercised their §7 right to select the union as their bargaining representative, therefore is no different from, and enjoys the same protection as the employees' direct §7 activities to engage in mutual aid and protection by protecting their hard won area standard wages and benefits.

In *Lechmere v. NLRB*, 502 U.S. 527 (1993), the Court held that in the organizing context, unions only have a derivative §7 right to enter the employer's property, and only because the employees of the un-organized employer have a right to learn of the advantages of organizing from the union. *See* 502 U.S. at 533, *citing NLRB v. Babcock & Wilcox*, 351 U.S. 105, 113 (1956). The Court then held that nonemployee organizers only have the right to access employer property when they do not have reasonable access to the employer's employees outside an employer's property because:

> In *Babcock*, as explained above, we held that the Act drew a distinction of substance between the union activities of employees and non-employees. In cases involving employee activities, we noted with approval, the Board balanced the conflicting interests of employees to receive information on self-organization on the company's property from fellow employees during nonworking time, with the employer's right to control the use of his property. In cases involving non-employee activities. However, the Board was not permitted to engage in the same balancing.

502 U.S. at 537. *Lechmere* therefore does not apply to the right of employees to access employer property.

When non-employees employed by a labor organization access employer property for the purpose of advancing the interests of employees who have already exercised their §7 right to select the labor organization as their bargaining representative, they have the same §7 right of access as the employees themselves. *Golden Stevedoring Co.*, 335 NLRB at 415 (2001); *Sears, Roebuck & Co.*, 304 NLRB at 59 (1991) It is immaterial that the employees are not employed by the employer whose property the non-employees is accessing, because §7 of the Act does not make a distinction between the rights of employees for mutual aid and protection when they have a dispute with their own employer as opposed to another employer, *Eastex*, 437 U.S. at 565. Therefore, area standards activities conducted by a union on behalf of employees who have already chosen the union as their bargaining representative is conducted by employees rather than nonemployees, so that *Lechmere* does not apply to analyzing the employees' right of access through their chosen representative.

While some courts of appeals have held that Lechmere applied to non-organizing activity, those cases assumed without discussion that access to private property was by non-employees, rather than by bargaining agents who are standing in the place of, and have the same §7 rights as employees. *See UFCW Local 880 v. NLRB,* 74 F. 3d 292, 294 (D.C. Cir. 1996); *Sparks Nugget v. NLRB*, 968 F. 2d 991, 997 (9th Cir. 1992). As discussed above, the assumption is unwarranted when the bargaining agents are acting on behalf of employees who have already selected the union as their bargaining representative.

b. The Board Should Overrule Leslie Homes.

The Board should reconsider and overrule an earlier Board's 3-2 decision in

Leslie Homes, 316 NLRB 123 (1995). In that case, the Board majority cited four reasons for concluding that *Lechmere* applied to access by someone other than the property owner's employees to conduct area standards activities. All four cited reasons do not stand up to scrutiny. The Board in *Leslie Homes* assumed without analysis that area standards activities are conducted by nonemployee organizers, and therefore constitute nonemployee distribution of union literature. However, as the dissent recognized:

> Rather, the rights of nonemployee union representatives engaged in non-organizational Section 7 activities are their own rights or those that arise from their role as the agents of employees who have already exercised their section 7 right to select a labor organization as their representative. Thus, the section 7 rights of non-employee union agents engaged in mutual aid and protection activities stand on a completely different footing under the statute than those of non-employee union organizers.

316 NLRB at 132. The position of the dissent is consistent with the holdings of *Giant Food Markets* and *O'Neil Markets*, which held that activities to protect area standard wages and benefits constitute activities by employees for their own mutual aid and protection. Moreover, once the employees have exercised their §7 right to select the union as their bargaining representative, it is immaterial for the purpose of determining the strength of the §7 right whether subsequent activities are conducted by the employees themselves, or by the labor organization as the employees' representative. *Sears*, 304 NLRB at 59. *See also* the dissent in *Mako Inc.*, 316 NLRB 109, 117 (1995) (By engaging in area standards activities, the union agents exercised the direct §7 rights of the employees they represent, rather than their own derivative §7 rights). Since area standards activities implicate the §7 rights of employees rather than the derivative §7 rights of nonemployees, the Board may properly balance the right of

employees to engage in activities for their mutual aid and protection on the employer's property with the employer's property rights. *Lechmere*, 502 U.S. at 537.

Second, the Board claimed that *Lechmere* was concerned with private property rights. While the statement is true, the *Lechmere* decision turned on the Court's conclusion that balancing the employees' §7 rights and the employer's private property rights produce different results, depending on whether the §7 rights are the direct rights of employees or the derivative rights of non-employee organizers. *See Id.* The conclusion that *Lechmere* does not apply to area standards activities fully respects the employer's property rights, which remain the same regardless of whether it is employees or nonemployees who seek access to the employer's property; but also recognizes that the employees' right to engage in area standards activities on the employer's property constitutes a far stronger §7 right, than the right of nonemployee organizers to, on behalf of employees who have not exercised their §7 right to select union representation, access the employer's property to organize its employees.

Third, the Board in *Leslie Homes* claimed that the courts had applied *Babcock* outside of the organizing context, citing as sole support the Supreme Court's decision in *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978). *See* 316 NLRB 123 n. 12. In *Sears*, the Court considered whether a state law claim that a union trespassed while engaging in picketing was pre-empted by the NLRA; and did not analyze whether area standards activities are conducted by employees or nonemployees. The Court assumed that area standards activities enjoyed the same §7 protection as organizing activities, and drafted a footnote summarizing some prior case law concerning the strength of the §7 right to engage in organizational and area standards picketing. See

436 U.S. 180 n. 42. However, the majority opinion in *Sears* was delivered on behalf of six justices. Two of the six member majority filed a concurrence opinion, which stated that the majority's discussion concerning the protected status of picketing to be a summary of the Board's past experiences, rather than how the Board must treat either organizational or other types of picketing in the future. See 436 U.S. at 511. Therefore, a majority of the Court in *Sears* did not adopt footnote 42 of the *Sears* opinion as a statement of how the strength of the §7 right to engage in area standards activities must be evaluated by the Board in the future. As the Sixth Circuit stated in *Giant Food Markets*, the statement in the footnote of the *Sears* majority opinion concerning the strength of the employees' right to engage in area standards picketing was dicta, and that:

> Although Justice Stevens did command a majority of the Court, there was far from unanimity on his dicta relating to area standards activity. It would be stretching this dicta too much to conclude that his statements were necessarily meant as pronouncements for the future rather than descriptions of the past.

633 F. 2d 18, 24 n. 13.

Nonetheless, the *Leslie Homes* Board majority cited to the following statement in *Lechmere* as the sole authority for its contention that footnote 42 of the *Sears* decision was anything more than non-binding dicta:

> If there was any question as to whether *Central Hardware* and *Hudgens* changed §7 law, it should have been laid to rest in *Sears*.

502 U.S. at 534-535, *as cited by Leslie Homes*, 316 NLRB at 129. However, the *Lechmere* court then explained the portion of the *Sears* decision that it was referring to, by stating that *Sears* held that trespassing by non-employee organizers was more likely to be unprotected than protected, because the union has a heavy burden of showing

that no other reasonable means of communicating its organizational message to the employee exists. *Lechmere*, 502 U.S. at 535, *citing Sears*, 436 U.S. at 205. The portion of the *Sears* opinion adopted by *Lechmere* therefore has nothing to do with either the strength of the §7 right to engage in area standards activities, or whether area standards activities as a matter of law are conducted by employees or non-employees. The *Leslie Homes* majority therefore improperly assigned the weight of binding precedent to footnote 42 of the *Sears* decision.

Fourth, the *Leslie Homes* majority stated that the employees do not have a direct §7 right to engage in area standards activities through their chosen bargaining representatives, because a similar argument could be made that employees have a direct §7 right to engage in organizing, which may benefit the employees. However, *Lechmere* focused on the employees' § 7 right to self-organization, without any consideration of the employees' broader §7 right to engage in concerted activities for their own mutual aid and protection. The Supreme Court therefore never considered whether already organized employees have a direct §7 right to organize other employers through their chosen bargaining representative, because they may derive a benefit from an increase in the number of organized employees. *Lechmere* cannot be read as a rejection of the employees' right to exercise their own §7 rights by using their bargaining representative to attempt to influence another employer, when the Supreme Court never considered the issue in its decision. As the two member minority in *Mako Inc.* noted:

> We cannot accept our colleagues' suggestion that, in failing to consider access rights under the "other concerted activity for the purpose of collective bargaining or other mutual aid or protection" portion of Sec. 7, *Lechmere* implicitly rejected union agents' access under that language in all circumstances. The rights

> protected by that language, recognized by the Court in Eastex, supra, are too substantial for the Court to have totally dismissed them in the access context without analysis or even acknowledgement. Had the Court given consideration to that portion of Sec. 7 in *Lechmere*, it no doubt would have so stated.

316 NLRB at 117.

Moreover, the majority in *Leslie Homes* erred by ignoring the fact that at the time *Lechmere* was decided, the prevailing view was that efforts to organize additional employees only had the most attenuated benefits for employees who are already represented by the labor organization. *Ellis v. Railway Clerks*, 466 U.S. 435, 451 - 452 (1984). While *Ellis* on its facts only concerned employers covered by the Railway Labor Act, courts applied its holding to other types of employers as well. *Lehhert v. Ferris Faculty Ass'n.*, 63 F. Supp. 1006, 1024-1025 (W.D. MI. 1986). Therefore, even if the Supreme Court did indirectly hold in *Lechmere* that employee did not have a direct §7 right to improve their benefits by organizing non-union employees in their industry, that conclusion was based on the prevailing view at the time that additional organizing did not benefit already organized employees. As the Supreme Court held in *Eastex*:

> It is true, of course, that some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the "mutual aid and protection" clause.

437 U.S. at 567-568.

On the other hand, there is a direct correlation between the Council's area standards activities, and its stated goal of ensuring an equal playing field, in which contractors compete for contracts based on factors other than labor costs. As the record below indicates, contractors in the trades represented by the Council compete for construction contracts. Contractors who do not pay area standards gain an

advantage by paying lower wages and benefits, which allow them to make a lower cost bid. A successful area standards campaign creates a more even playing field by ensuring that more contractors, by virtue of their payment of area standard wages and benefits, compete for jobs based on factors other than labor costs, which is the desired result of the Council acting on behalf of employees who have already exercised their §7 right to choose the Council as their bargaining representative. (Tr. 41-46) *Lechmere* therefore cannot be read as a rejection of the principle that employees do have the §7 right, through their chosen bargaining representative, to engage in mutual aid and protection to ensure an even playing field amongst contractors by protecting area standards wages and benefits.

c. An Employer's Discrimination Between Area Standards and Charitable Solicitations is Subject to the Republic Aviation Balancing Test.

For the above stated reasons, *Leslie Homes* incorrectly read the *Lechmere* as applying to area standards activities. Rather, since area standards activities are an exercise of the employees' own §7 rights, whether employers may interfere with the employees direct exercise of their §7 rights depends on balancing the strength of the §7 right with the employer's property rights. *Lechmere*, 502 U.S. at 537. The balancing may give the employees the right to access employer property, even when the employer does not discriminate between union and non-union solicitations. *Mako Inc.*, 305 NLRB 663 (1991) (union should be permitted to distribute area standards handbills somewhere on the employer's property, despite the employer's substantial property interests, because there is no other reasonable means of communicating with potential customers, and handbilling near the entrance to passing cars may be ineffective and

possibly dangerous).

The employer in any event must demonstrate a business justification for its interference with the employees' §7 rights, which outweigh the strength of its property right. *Textile Workers Union v. Darlington*, 380 U.S. 263, 268 (1965); *Republic Aviation v. NLRB*, 324 NLRB 793, 803 (1945) (Employer's rule barring union solicitations by employees violated §8(a)(1) of the Act, when the employer cannot advance any business justifications supporting its rule). The Board should therefore hold that the balancing test of *Republic Aviation* applies to determining whether an employer may prohibit employees from engaging in §7 protected area standards activities on its property. In performing the balancing test the Board should keep in mind that an employer's property interests are substantially diminished when it allows non-union access to its property for purposes unrelated to its business. *Target Stores*, 292 NLRB 933, 935 (1988); *Giant Food Stores*, 241 NLRB at 935. *See also Guard Publishing Co.*, 351 NLRB 1110 (2009) (Employer forfeits its property right to prohibit non-work use of its email system when its email prohibition discriminated against §7 activity).

4. Roundy's has Engaged in Unlawful Discrimination.

Roundy's has permitted a wide range of non-charitable civic and political solicitations on its property, including potentially controversial and divisive appeals to its customers by a political candidate, an environmental group, and the UFCW's advocacy of an anti-Walmart message. Courts have consistently held that once an employer permits other potentially controversial solicitations on its property, it does not have a legitimate business justification for prohibiting solicitation by the union. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 503 (1978) (Employer cannot prohibit union

solicitations in its cafeteria, when it has permitted in its cafeteria discussions over treatment of patients that may be far more upsetting to patients and their families); *6 West Ltd Corp. v. NLRB*, 237 F. 3d 767, 780 (7th Cir. 2001) (Employer cannot prohibit solicitations for union support if it also permitted other solicitations that may bother its employees or customers); *Lucille Salter*, 97 F. 3d at 590-591 (Employer cannot prohibit union solicitations, at the same time that it permitted other solicitations that are not necessarily of benefit to its employees). Similarly, once Roundy's permitted solicitations by other groups that may be controversial or upsetting to its consumers, it cannot single out the Council's handbilling activities for discriminatory treatment.

In *Republic Aviation* the Court held that an employer's interference with the employees' §7 rights must be supported by a sufficient business justification, i.e. that the interference is necessary to maintain production or discipline. See 324 U.S. at 803. The business justification cannot discriminate between union and non-union solicitations along §7 lines. *Guard Publishing Co.*, 351 NLRB 1110, 1118 (2007). An employer therefore cannot discriminate between otherwise similar communications on the ground that one concerns a subject of interest to the union, while another communication did not. *Id.*, 351 NLRB at 1119. Similarly, Roundy's cannot discriminate between appeals by the Council and environmental and political groups to the same group of consumers, on the ground that it disagreed with the Council's message. Since Roundy's has failed to articulate a non-discriminatory justification for its interference with Council handbilling, the Board should affirm the ALJ's finding of an §8(a)(1) violation for the two stores, for which the Board found Roundy's had a sufficient property interest to exclude Council handbillers.

Dated this 6th day of January, 2011.

Matthew R. Robbins
Yingtao Ho
Previant, Goldberg, Uelmen,
Gratz, Miller & Brueggeman, S.C.
1555 N. RiverCenter Drive #202
Milwaukee, WI 53212
PH: 414/271-4500
FAX: 414/271-6308

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ROUNDY'S INC.,

Petitioner,

Case No. 10-3921

v.

NATIONAL LABOR RELATIONS BOARD and MILWAUKEE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO

CERTIFICATE OF SERVICE

The undersigned certifies that on the 6th day of January 2011, she mailed the BRIEF OF THE CHARGING PARTY via U.S. mail upon:

ORIGINAL:

Mr. Lester Heltzer (Via UPS Overnight)
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

COPIES:

Scott Gore
Laner, Muchin, Dombrow, Becker,
Levin and Tominberg, Ltd.
515 N. State St., Ste. 2800
Chicago, Illinois 60610

Andrew Gollin
NLRB, Region 30
310 West Wisconsin Avenue, Ste. 700
Milwaukee, Wisconsin 53203

Dated January 6, 2011

Catherine Y. Perez
Catherine Y. Perez
Secretary to Yingtao Ho

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